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Supreme Court, U.S.
FILED
OCT 21 2003
OFFICE OF THE CLERK

No. 03-468

In the

Supreme Court of the United States

ROY S. MOORE, CHIEF JUSTICE
OF THE ALABAMA SUPREME COURT,

Petitioner,

v.

STEPHEN R. GLASSROTH, MELINDA MADDOX,
AND BEVERLY J. HOWARD,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONER

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17 pp.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Thomas More Law Center respectfully moves this Court for leave to file the attached amicus curiae brief in support of the Petitioner, Chief Justice Roy S. Moore. The consent of the attorneys for the Petitioner has been obtained. The consent of the attorneys for the Respondents was requested but refused.

The Thomas More Law Center is a national, not-for-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the sanctity of human life, time-honored values, and the religious freedom of Christians, including the display of the Ten Commandments on public property. As part of its litigation efforts, the Thomas More Law Center has represented government entities in defense of lawsuits seeking to remove Ten Commandments monuments from public property, and the Thomas More Law Center has submitted amicus curiae briefs at the United States Court of Appeals level in support of the public display of such monuments. In particular, the Thomas More Law Center filed an amicus curiae brief, *with the consent of all parties*, in the United States Court of Appeals for the Eleventh Circuit in support of Chief Justice Moore. Accordingly, the Thomas More Law Center has an interest and an expertise in this area of the law, which will be of assistance to this Court in deciding whether to grant Chief Justice Moore's petition for a writ of certiorari.

The Thomas More Law Center's amicus curiae brief points out that this case presents not only the opportunity, as argued in the Petition, for this Court to re-examine *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but also the opportunity to re-evaluate *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), and to clarify for the lower courts the proper scope and applicability, if any, of *Stone* to cases involving the display of the Ten Commandments in non-public school contexts.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONER

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

ABINGTON SCH. DIST. v. SCHEMPP, 374 U.S. 203 (1963) 4

ACLU v. CITY OF PLATTSMOUTH, 186 F. SUPP. 2D 1024 (D. NEB. 2002) 5

ACLU v. HAMILTON COUNTY, 202 F. SUPP. 2D 757 (E.D. TENN. 2002) 5

ACLU v. MERCER COUNTY, 219 F. SUPP. 2D 777 (E.D. KY. 2002) 9

ADLAND v. RUSS, 307 F.3D 471 (6TH CIR. 2002), CERT. DENIED, 123 S. CT. 1909 (2003) 5, 11

ANDERSON v. SALT LAKE CITY CORP., 475 F.2D 29 (10TH CIR. 1973), CERT. DENIED, 414 U.S. 879 (1973) 6, 9, 11

BOOKS v. CITY OF ELKHART, 235 F.3D 292 (7TH CIR. 2000), CERT. DENIED, 121 S. CT. 2209 (2001) 5, 9, 11

CITY OF ELKHART v. BOOKS, 121 S. CT. 2209 (2001) 8

COLORADO v. FREEDOM FROM RELIGION FOUND., 898 P.2D 1013 (COL. 1995) (EN BANC), CERT. DENIED, 516 U.S. 1111 (1996) 8, 9, 11

COUNTY OF ALLEGHENY v. ACLU, 492 U.S. 573 (1989) 7, 10

CROCKETT V. SORENSON, 568 F. SUPP. 1422 (W.D. VA. 1983) 9

EDWARDS V. AGUILLARD, 482 U.S. 578 (1987) 7, 8

ENGEL V. VITALE, 370 U.S. 421 (1962) 4, 5

FREETHOUGHT SOC'Y V. CHESTER COUNTY, 334 F.3D 247 (3D CIR. 2003) 11

HOHN V. UNITED STATES, 524 U.S. 236 (1998) 6

KIMBLEY V. LAWRENCE COUNTY, 119 F. SUPP. 2D 856 (S.D. IND. 2000) 5

LEE V. WEISMAN, 505 U.S. 577 (1992) 7

LEMON V. KURTZMAN, 403 U.S. 602 (1971) 2, 4

LYNCH V. DONNELLY, 465 U.S. 668 (1984) 10

SANTA FE INDEP. SCH. DIST. V. DOE, 530 U.S. 290 (2000) 4

STONE V. GRAHAM, 449 U.S. 39 (1980) (PER CURIAM) ..... *passim*

SUMMUM V. CITY OF OGDEN, 152 F. SUPP. 2D 1286 (D. UTAH 2001) AFF'D IN PART, REV'D IN PART, 297 F.3D 995 (10TH CIR. 2002) 9

RULES

Sup. Ct. R. 29.6 1

Sup. Ct. R. 37.6 1

STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Thomas More Law Center is a national, not-for-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the sanctity of human life, time-honored values, and the religious freedom of Christians, including the display of the Ten Commandments on public property. As part of its litigation efforts, the Thomas More Law Center has represented government entities in defense of lawsuits seeking to remove Ten Commandments monuments from public property, and the Thomas More Law Center has submitted amicus curiae briefs in the United States Court of Appeals for the Sixth Circuit, Seventh Circuit, and the Eleventh Circuit in support of the public display of such monuments. Accordingly, the Thomas More Law Center has an interest and an expertise in this area of the law, which will be of assistance to this Court in deciding whether to grant Chief Justice Moore's petition for a writ of certiorari.

The Thomas More Law Center appears as amicus curiae in support of Chief Justice Moore and urges this Court to grant his petition for a writ of certiorari.[1]

SUMMARY OF THE ARGUMENT

To date, this Court has not decided a case that involves the display of the Ten Commandments, whether displayed alone or as part of a broader display,

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

in a non-public school context. This case presents this Court with that opportunity.

More than twenty years ago, this Court decided in summary fashion *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), which involved the mandated display of the Ten Commandments, by themselves, in public school classrooms. This Court determined that even though the Kentucky Legislature had set forth a secular purpose for the display, the religious nature of the Ten Commandments overrode that secular purpose and thus led this Court to conclude that the Establishment Clause had been violated.

Stone, although squarely a public school case, has led to a presumption against the display of the Ten Commandments in non-public school contexts. This case presents this Court with the opportunity to re-evaluate *Stone* and to clarify the proper scope and applicability of *Stone* in order to provide lower courts with guidance on how to evaluate government displays, which include the Ten Commandments, in non-public school contexts.

Such guidance from this Court is especially needed in light of the mounting litigation over the public display of the Ten Commandments in non-public school contexts, litigation that has resulted in contrary results in this country.

This Court should grant a writ of certiorari in this case for the reasons stated in this brief, as well as for the reasons set forth in the Petition, including that this Court re-examine *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a viable precedent. Pet. 11-25.

ARGUMENT

At issue in this case is the "moral foundation of law" display that appeared in the Rotunda of the Alabama Supreme Court and contained a monument that includes the text of the Ten Commandments, which has secular and religious attributes, along with the national motto "In God We Trust," and quotations from the Declaration of Independence, George Mason, and James Madison among many other quotations that address the moral foundation of our law. In addition to the monument, the display includes a plaque with quotations regarding the moral foundation of law by Martin Luther King, Jr. and Frederick Douglass. And, the display includes a plaque inscribed with the Bill of Rights. Pet. App. 47a-50a, 52a, 104a-107a, 115a.

This Court has never decided a case that involves the display of the Ten Commandments, whether alone or in a broader context, as in the instant case, in a non-public school context. This case presents this Court with that opportunity.

More than twenty years ago, in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), this Court considered a Kentucky statute that required school officials to post a copy of the Ten Commandments *alone* on the wall of each public school classroom in Kentucky. *Id.* at 39. This Court summarily struck down the law, holding that it served no secular purpose, even though the Kentucky Legislature had required the following statement of secular purpose to appear at the bottom of each display: "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" *Id.* at 41.

Despite the Kentucky Legislature's stated secular purpose for the display, this Court nevertheless summarily wrote: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters. . . ." *Id.* at 41. This Court, therefore, concluded that the Kentucky statute in question violated the first prong (the purpose prong) of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and consequently violated the Establishment Clause.[2] *Id.* at 42-43.

In reaching its ruling in *Stone*, apart from referencing *Lemon*, this Court relied only on public school prayer cases, *id.* at 40-43 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading and Lord's Prayer), and *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer)), thus indicating that this Court viewed *Stone* as a public school prayer case in concluding that the Kentucky Legislature's requirement that the Ten Commandments be posted on the classroom walls was purely a religious admonition along the lines of the religious practices prohibited in *Schempp* and *Engel*.

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[2] Justices of this Court have criticized *Lemon*, and the time has come for this Court to re-evaluate *Lemon* as a viable precedent, as Chief Justice Moore argues in his Petition. Pet. 11-25; *see, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting) (explaining that "*Lemon* has had a checkered career in the decisional law of this Court" and collecting Supreme Court opinions criticizing *Lemon* and noting further that this Court has stated that *Lemon* is not binding on it).

Even though *Stone* is essentially a public school prayer case and is limited to the public school context with regard to the display of the Ten Commandments, as Chief Justice Moore points out in his petition, "*Stone* has become the touchstone of all Ten Commandment display cases, as it was in the Court of Appeals below."[3] Pet. 18 n.4.

In particular, the Court of Appeals relied on *Stone* in rejecting Chief Justice Moore's argument that the Ten Commandments, which were part of the overall Rotunda display, depicts the moral foundation of secular duties. Pet. App. 27a, 30a. The Court of Appeals stated that as this Court declared in *Stone*, "'[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.'" *Id.* (citing *Stone*, 449 U.S. at 41). Moreover, the Court of Appeals stated that the "[u]se of the Ten Commandments for a secular purpose . . . does not change their inherently religious nature. . . ." *Id.*

The Court of Appeals' reading of *Stone* illustrates an incorrect presumption stemming from *Stone* that the display of the Ten Commandments on government property, even in a non-public school context, violates the Establishment Clause based on the view that no secular purpose for displaying the Ten Commandments can overcome the religious nature of the Decalogue.

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[3] *E.g.*, *Adland v. Russ*, 307 F.3d 471, 480-81 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 1909 (2003); *Books v. City of Elkhart*, 235 F.3d 292, 302-04 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 2209 (2001); *ACLU v. Hamilton County*, 202 F. Supp. 2d 757, 763 (E.D. Tenn. 2002); *ACLU v. City of Plattsmouth*, 186 F. Supp. 2d 1024, 1032 (D. Neb. 2002); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 865-66 (S.D. Ind. 2000).

This Court could hardly have intended such a presumption when it drafted *Stone* more than twenty years ago or intended for *Stone* to be applied to Ten Commandments displays in non-public school contexts. This case presents this Court with the opportunity to re-evaluate *Stone* and clarify the proper scope and applicability of *Stone* to cases involving the display of the Ten Commandments in non-public school contexts.[4]

Indeed, this Court should not feel constrained to follow *Stone*, which by its very nature is a weak precedent, and this Court should be concerned with the strength the lower courts have given to *Stone* in non-public school contexts.[5] *Stone* is a 5-to-4 per curiam opinion. It was a "cavalier summary reversal" of the courts of Kentucky that was done without the benefit of oral argument, briefing, or plenary consideration by this Court. *Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting); *see also id.* at 43 (Burger, CJ., joined by Blackmun, J., dissenting); *id.* (Stewart, J., dissenting). This Court has explained that it is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998).

Reliance on *Stone* outside the public school context has limited, if any, value since the unique and particular circumstances of the public school context, which led to

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[4] At the time *Stone* was decided, there was little, if any, litigation over the public display of the Ten Commandments in non-public school contexts, and there was only one published federal circuit court decision on the subject, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), which the *Stone* majority did not even reference, further supporting the conclusion that *Stone* is intended to be limited to the public school context.

[5] *See, e.g.*, n.3, *supra*.

the holding in *Stone*, do not extend outside that context. This Court should make that clear to the lower courts.

The public school context in which the *Stone* majority considered the display of the Ten Commandments explains the majority's summary conclusions about the Decalogue's religious nature and its summary rejection of the secular purpose advanced by the Kentucky Legislature for displaying the Ten Commandments in those classrooms.

This Court always has been especially concerned about religious activities in public schools, a heightened concern that it does not extend beyond the public school context. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 620 n.69 (1989) (explaining that although a public display of a Christmas tree and a menorah in a non-public school context was found to be constitutional, such a display located in a public school context would raise additional constitutional considerations since the Establishment Clause must be applied with a special sensitivity in that context).

The heightened concerns this Court has about anything religious in the public school setting, however, should not be applied to displays of the Ten Commandments in non-public school settings, where children are not compelled to be present as they are in a public school classroom where the Ten Commandments

are posted alone as in *Stone*. *See Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1023 (Col. 1995) (en banc) (explaining that reliance on *Stone* is misplaced in analyzing the display of the Ten Commandments except when the Decalogue is displayed in a public school classroom, where students are compelled to attend and are easily influenced), *cert. denied*, 516 U.S. 1111 (1996).

Moreover, although originating from a religious text, the Ten Commandments are not as limited in scope as the *Stone* majority suggested. This Court should make it clear to the lower courts that it did not intend in *Stone* to limit the importance of the Ten Commandments to being just a "sacred text" that lacks secular applications and that it did not intend to raise the presumption that the public display of the Ten Commandments violates the Establishment Clause even in a non-public school context.[6]

As has been repeatedly acknowledged, especially after the issuance of *Stone*, except by a majority of this Court, the Ten Commandments undeniably form the basis of the judicial code of Western Civilization, which is something that should be acknowledged in public and which was what the broad display in the Rotunda of the Alabama Supreme Court conveyed to its viewers. *See, e.g., City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) ("Undeniably . . .

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[6] Although in *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), a public school case, this Court explained that it did not mean in *Stone* that "no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization," this limitation of *Stone* needs to be reiterated by this Court in the context of the display of the Ten Commandments in a non-public school setting.

the [Ten] Commandments have secular significance [besides being a sacred text] because they have made a substantial contribution to our secular legal codes."); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society. . . ."), *cert. denied*, 121 S. Ct. 2209 (2001); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir. 1973) (noting that the Ten Commandments have religious and secular attributes), *cert. denied*, 414 U.S. 879 (1973); *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 784 (E.D. Ky. 2002) ("[F]or good or bad, right or wrong, the Ten Commandments *did* have an influence upon the development of United States law. . . ."); *Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) ("The 'Ten Commandments,' while a sacred text to some and an ethical code of conduct to others, is also a landmark in the history of the development of Western law."), *aff'd in part, rev'd in part*, 297 F.3d 995 (10th Cir. 2002); *Crockett v. Sorenson*, 568 F. Supp. 1422, 1428 (W.D. Va. 1983) ("[T]he Ten Commandments have had immeasurable effect on Anglo-American legal development."); *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1024 (Colo. 1995) (en banc) (noting "the historical fact that the Ten Commandments has served over time as a basis for our national law"), *cert. denied*, 516 U.S. 1111 (1996).

This Court should clearly acknowledge the contributions the Ten Commandments have made to the development of our law to ensure that there is no presumption, as *Stone* tends to engender, that there can be no secular purpose for the display of the Ten Commandments in public, even in a non-public school context.

Along those lines, because *Stone* pre-dates *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which are this Court's two leading cases that provide the analytical framework for determining the constitutionality of government displays of items with religious connotations, this Court should clarify for the lower courts how *Stone* should be weighed, if at all, when analyzing the display of the Ten Commandments in non-public school contexts in light of *Lynch* and *Allegheny*.

In *Lynch* and *Allegheny*, this Court upheld the government display of religious symbols (the crèche and the menorah) as part of a broader display in a non-public school context. *Lynch*, 465 U.S. at 671-72, 687; *Allegheny*, 492 U.S. at 581-82, 621. Although in *Lynch* and *Allegheny* religious objects (the crèche and the menorah) were permitted to be included in public displays, the same result does not generally occur when the Ten Commandments are involved, even though the Commandments have both sacred and secular attributes, which can reasonably be attributed to the presumption in *Stone* against the public display of the Ten Commandments, no matter the secular purpose for the display. If a crèche and a menorah, both religious symbols, may be included in public displays, then the Ten Commandments, which have both sacred and secular attributes, should be permitted, especially when the Ten Commandments are included in a broad display, as occurred here, to commemorate the foundation of our laws.

In sum, this case presents this Court with the opportunity to re-evaluate and clarify *Stone* and to re-examine *Lemon*. In so doing, this Court should give guidance to the lower courts on how to analyze displays of the Ten Commandments in non-public school

contexts, which is especially needed in light of the mounting litigation in this area that has produced contrary results throughout this country. *E.g.*, *Freethought Soc'y v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (allowing display of Ten Commandments); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (not allowing display of Ten Commandments), *cert. denied*, 123 S. Ct. 1909 (2003); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (not allowing display of Ten Commandments), *cert. denied*, 121 S. Ct. 2209 (2001); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) (allowing display of Ten Commandments), *cert. denied*, 414 U.S. 879 (1973); *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013 (Col. 1995) (en banc) (allowing display of Ten Commandments), *cert. denied*, 516 U.S. 1111 (1996).

CONCLUSION

This Court should grant a writ of certiorari in this case for the above-stated reasons, as well as for the reasons set forth in the Petition.

Respectfully submitted,

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